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9 Attorneys for Specially Appearing Defendants
WISDOM MARINE LINES, S.A, WISDOM MARINE
10 LINES CO., LTD., and SAO WISDOM, S.A.

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13
14 ARABIAN GAS AND OIL DEVELOPMENT) Case No. 4:16-cv-03801-DMR
15 COMPANY, a Bahrain Corporation,)
16 Plaintiff,) Related Case: 4:16-cv-03872-DMR
17 vs.)
18 WISDOM MARINES LINES, S.A, a Panama) **SPECIALLY APPEARING DEFENDANTS'**
19 Corporation, WISDOM MARINES LINES CO.,) **NOTICE OF MOTION AND MOTION TO**
LTD., a Cayman Islands Corporation, and SAO) **INCREASE UNDERTAKING POSTED BY**
WISDOM, S.A., a Panama corporation,) **PLAINTIFF WITH THE COURT;**
Defendants.) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT THEREOF**
Date: November 10, 2016
Time: 11:00 a.m.
Place: Courtroom 4

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24 **TO PLAINTIFF AND ITS ATTORNEY OF RECORD:**

25 **PLEASE TAKE NOTICE** that on November 10, 2016, at 11:00 a.m. in Courtroom 4,

26 3rd Floor of the United States District Court, Northern District of California, Oakland Courthouse,
27 located at 1301 Clay Street, Oakland, California 94612, Specially Appearing Defendants WISDOM
28 MARINE LINES, S.A., WISDOM MARINE LINES CO., LTD., and SAO WISDOM, S.A.

1 (collectively “Defendants”) will move for an order increasing the amount of the undertaking posted by
 2 Plaintiff ARABIAN GAS AND OIL DEVELOPMENT COMPANY (“AGODCO”) with the Court to
 3 secure Defendants’ recovery of damages for wrongful attachment.

4 Notwithstanding that the Court has already quashed AGODCO’s writ of attachment
 5 and released the vessel M/V *GLOBAL FAITH* (“the Vessel”) from attachment, in the event that
 6 Defendants’ defeat AGODCO’s counterclaim in the London arbitration (which is the underlying
 7 action for purposes of AGODCO’s writ of attachment efforts before this Court), AGODCO’s
 8 attachment of the Vessel will be conclusively deemed wrongful pursuant to California Code of Civil
 9 Procedure section 490.010(b). In such circumstances, AGODCO will be liable to Defendants to the
 10 full extent of their damages, including attorney’s fees and costs, incurred by reason of AGODCO’s
 11 wrongful attachment of the Vessel. However, as any recovery Defendants’ may seek is limited by
 12 statute to the amount of the undertaking AGODCO posted with the Court, and as the \$10,000 amount
 13 of the present bond does not adequately compensate Defendants for their damages for AGODCO’s
 14 wrongful attachment of the Vessel, Defendants bring the present motion to increase the amount of the
 15 undertaking to be posted by AGODCO to adequately secure their future claim for damages for
 16 wrongful attachment.

17 This Motion is based on this Notice of Motion and Motion, the Memorandum of Points
 18 and Authorities (and attachments thereto), the Declaration of James A. Marissen, the pleadings on file
 19 in this matter and on any oral argument the Court entertains at the hearing on the Motion.

20
 21
 22 DATED: September 29, 2016

/s/ James A. Marissen

23 ELIZABETH P. BEAZLEY

24 JAMES A. MARISSEN

25 JENNIFER M. PORTER

26 CHRISTOPHER R. FARNSWORTH

27 KEEBAL, YOUNG & LOGAN

28 Attorneys for Specially Appearing Defendants

WISDOM MARINE LINES, S.A, WISDOM MARINE
 LINES CO., LTD., and SAO WISDOM, S.A.

MEMORANDUM OF POINTS AND AUTHORITIES

Specially Appearing Defendants WISDOM MARINE LINES, S.A., WISDOM MARINE LINES CO., LTD., and SAO WISDOM, S.A. (collectively “Defendants”) hereby submit the following Memorandum of Points and Authorities in support of their Motion to Increase the Amount of the Undertaking posted by Plaintiff ARABIAN GAS AND OIL DEVELOPMENT COMPANY’s (“AGODCO”) with the Court.

I.

INTRODUCTION

California writ of attachment law is clear. If the underlying claim pursuant to which a writ of attachment was obtained is not successful, the attachment is conclusively deemed “wrongful” and a defendant shall recover all damages, including attorneys’ fees, incurred by reason of the attachment. Indeed this explains why a plaintiff must provide an undertaking prior to attaching a defendant’s property in the first instance—the undertaking is security for a potential claim for damages for wrongful attachment. As the statutory minimum undertaking amount of \$10,000 posted by AGODCO with the Court is woefully short of the total amount of Defendants’ anticipated damages for AGODCO’s wrongful attachment of the vessel M/V *GLOBAL FAITH* (the “Vessel”), Defendants bring the present motion and respectfully request the Court, in its discretion, order the undertaking posted by AGODCO be increased to \$186,804.05.

II.

PROCEDURAL HISTORY

AGODCO and Defendant Wisdom Marine Lines S.A. (“Wisdom”), one of the Defendants herein, have been embroiled in arbitration over a Memorandum of Agreement for the sale and purchase of a vessel originally identified as “Namura Handy BC Hull No. 387” and later named “ECO QUICKFIRE” since December 31, 2015, when Wisdom initiated a claim for damages against AGODCO in a London arbitration. AGODCO filed a counterclaim against Wisdom on February 5, 2016.

1 In order to try to obtain security for its counterclaim in the London arbitration,
 2 AGODCO filed its Verified Complaint and also submitted an Application for Right to Attach Orders
 3 in the present proceedings (“Application”), all of which sought to attach the Vessel as security. *See*
 4 Dkt. Nos. 1 and 3.

5 On July 8, 2016, the Court granted AGODCO’s Application for a Right to Attach
 6 Order (Dkt. No. 14), but without first posting the requisite undertaking with the Court and/or
 7 complying with the Court’s express order in that regard, AGODCO simply proceeded to attach the
 8 Vessel, which it did soon thereafter. It was not until July 15, 2016 that AGODCO posted a bond (for
 9 the statutory minimum amount of \$10,000) prompting the Court to formally issue the writ of
 10 attachment for the Vessel. *See* Dkt. Nos. 17 and 19.

11 On July 20, 2016, Defendants filed a Motion to Vacate the Attachment of the Vessel
 12 and to Increase the Amount of the Bond posted with the Court (the “Motion”). Dkt. No. 28.

13 On July 25, 2016, Defendants filed a formal objection to the amount of the bond under
 14 California Code of Civil Procedure section 489.010. Dkt. No. 35.

15 On August 4, 2016, after considering the Parties’ moving papers and oral argument in
 16 relation to the Motion, the Court quashed the writ of attachment and ordered the immediate release of
 17 the Vessel from attachment. Dkt. Nos. 52 and 53. Although Defendants raised the issue of
 18 sufficiency of the bond amount to the Court during the hearing on the Motion, the Court suggested
 19 that Defendants address the issue by way of a separate motion or other procedure. *See* Declaration of
 20 James Marissen (“Marissen Decl.”), ¶ 15; Ex. 1; Transcript of August 4 Hearing, 34:20–37:1.

21
 22 **III.**

23 **LEGAL ARGUMENT**

24 Pursuant to California Code of Civil Procedure section 489.210, a plaintiff must post a
 25 bond to obtain a writ of attachment, the purpose of which is to secure the damages a defendant may
 26 obtain should the attachment later be found to have been wrongful. *See Vershow v. Reiner*, 231 Cal.
 27 App. 3d. 882–883 (1993) (holding that a writ of attachment is void ab initio if mistakenly issued
 28 without a bond). Among other instances, an attachment is “wrongful” if a levy is made and plaintiff

1 does not recover judgment in the underlying action. *See* Cal. Civ. Proc. Code § 490.010(b). In such
 2 circumstances, a plaintiff is liable to defendant for all damages proximately caused by the wrongful
 3 attachment (including loss of credit and business losses), plus all costs and expenses, including
 4 attorneys' fees, reasonably expended in defeating the attachment. *See* Cal. Civ. Proc. Code
 5 § 490.020(a) and Comments thereto (emphasis added).

6 However, the liability of the plaintiff (and their surety) for damages for wrongful
 7 attachment is limited to the amount of the undertaking posted with the Court. *See* Cal. Civ. Proc.
 8 Code § 490.020(b). That said, and while the statutory minimum amount of an undertaking to obtain a
 9 writ of attachment is \$10,000 (*see* Cal. Civ. Proc. Code § 489.220(a)), a defendant whose damages
 10 would be larger than the statutory amount may object to the statutory amount and the court may then
 11 order the undertaking be increased to the amount of the "probable recovery for wrongful attachment if
 12 it is ultimately determined that the attachment was wrongful." *See* Cal. Civ. Proc. Code §§ 489.010,
 13 489.220(b), 995.020, 995.930; *see also Sony Ericsson Mobile Communs. AB v. Delta Elecs. (Thail.)*
 14 *Pub. Co.*, No. C-09-1326 MMC, 2009 U.S. Dist. LEXIS 36497, at *19 (N.D. Cal. Apr. 15, 2009)
 15 (increasing bond amount from \$10,000 to \$350,000).

16 Here, the prevailing circumstances compel that the statutory minimum bond of \$10,000
 17 posted by AGODCO be immediately increased to \$186,804.05, representing Defendants' "probable
 18 recovery for wrongful attachment" in the likely event AGODCO's counterclaim in the London
 19 arbitration (being the underlying claim for which AGODCO sought the writ of attachment) fails.¹ As
 20 discussed below, the statutory amount is woefully inadequate to address the damages Defendants
 21 incurred by reason of AGODCO's now failed writ of attachment efforts.

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26 ¹ To the extent the Court seeks to evaluate the likelihood of success on the merits of AGODCO's
 27 claim, the Court need look no further than the Parties' prior submissions in regards to Defendants'
 Motion to Dismiss and Motion to Vacate Attachment.

1 A. **DEFENDANTS' "PROBABLE RECOVERY FOR WRONGFUL**
 2 **ATTACHMENT" TOTALS \$186,804.05.**

3 Defendants submit that the amount of \$186,804.05 appropriately represents their
 4 "probable recovery for wrongful attachment." This amount consists of the following items:

- 5 • \$115,884.05 for Defendants' United States counsel, Keesal, Young & Logan (*see*
 6 Marissen Decl., ¶¶ 9–10);
- 7 • \$40,850 for Defendants' English counsel, Holman Fenwick Willan (*see* Marissen
 8 Decl., ¶ 11);
- 9 • \$13,330 for Defendants' Bahraini counsel, the Amin Law Firm (*see* Marissen
 10 Decl., ¶ 12);
- 11 • \$1,000 for Defendants' Taiwanese counsel, Jheding International Law Offices (*see*
 12 Marissen Decl., ¶ 13);
- 13 • \$740.00 for Defendants' marine surveyor, Brookes Bell (*see* Marissen Decl., ¶ 14);
- 14 • \$15,000 for preparation of the present Motion to Increase the Amount of the
 15 Undertaking and for anticipated fees for preparation of Motion for Damages for
 16 Wrongful Attachment;

17 **TOTAL:** \$186,804.05.

18 While commercial losses by way of the attachment of the Vessel appear to have been
 19 avoided, Defendants' attorneys' fees and costs (which are statutorily codified as recoverable items of
 20 damage for wrongful attachment), were necessarily incurred in defeating AGODCO's writ of
 21 attachment and are otherwise reasonable under the circumstances. AGODCO's writ of attachment
 22 efforts were complex and multi-jurisdictional, and required significant time and attention from
 23 Defendants' United States, English, Bahraini and Taiwanese counsel.

24 Specifically, the two primary issues upon which the Court based its decision to quash
 25 AGODCO's writ of attachment were comprehensively briefed by Defendants. Indeed, the briefing in
 26 relation to subject matter jurisdiction required significant legal research and detailed analysis of this
 27 complex and somewhat novel area of the law, being namely the scope of jurisdiction conferred by the

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1 Federal Arbitration Act in situations where the sole remedy sought is attachment to secure a potential
 2 award for a pending arbitration counterclaim in a foreign jurisdiction. *See* Marissen Decl., ¶ 7.

3 Moreover, Defendants' main (and prevailing) argument that AGODCO had failed to
 4 discharge its burden that it was more likely than not to succeed on its underlying counterclaim
 5 mandated a detailed review of the procedural status of the London arbitration, a detailed review and
 6 recitation of the underlying facts of the dispute, as well as coordination of Defendants' legal
 7 arguments in support of its original claim and its defenses to AGODCO's counterclaim. *See id.*, ¶¶ 6,
 8 11. As AGODCO's underlying counterclaim is pending in London and governed by English law, it
 9 was necessary for Defendants' English counsel, Holman Fenwick Willan, to be intimately involved in
 10 developing Defendants' merits-based arguments and also required extensive declarations both on
 11 points of law and relevant facts of the dispute. *See id.* Indeed, to further support Defendants' merit-
 12 based arguments, Defendants' obtained a declaration from their appointed marine surveyor, Brookes
 13 Bell, to refute AGODCO's claims regarding alleged defects with the construction of the ECO
 14 QUICKFIRE. *See id.*, ¶ 14.

15 Furthermore, and while unnecessary for the Court to decide these issues, Defendants
 16 remain firm in their convictions that AGODCO lacked the capacity to bring a claim in California in
 17 the first instance, as its corporate existence and status remain in dispute and was further clouded by
 18 AGODCO's own inconsistent representations in its Verified Complaint and opposition to Defendants'
 19 Motion and declarations submitted in support thereto. As the capacity of a foreign corporation to sue
 20 is determined by the law of the country where the corporation is allegedly registered or existing,
 21 Defendants' argument required the retention of Bahraini counsel and significant assistance from
 22 Bahraini counsel both as to points of Bahraini law and as to factual investigations of AGODCO's
 23 corporate status. *See id.*, ¶ 12. Similarly, and in response to the Court's request for supplemental
 24 briefing, Defendants' arguments required the retention of Taiwanese counsel and significant assistance
 25 from them on this issue whether English arbitration decisions are enforceable in Taiwan as a matter of
 26 Taiwanese law. *See id.*, ¶ 13.

27 Also, and generally speaking, the unique circumstances whereby California writ of
 28 attachment law, and not federal maritime law, governed the attachment of the Vessel, presented

1 additional challenges to be addressed in Defendants' Motion and defense efforts. *See id.*, ¶ 7. Indeed,
 2 Defendants maintain that the mandatory off-set as required under California Code of Civil Procedure
 3 section 483.015(b) should have reduced AGODCO's security demand to zero.

4 Lastly, Defendants have incurred legal fees and costs to prepare the present motion to
 5 increase the undertaking posted with the Court and also anticipate incurring additional costs and fees
 6 to prepare and file its motion for damages for wrongful attachment. These motions are both grounded
 7 in AGODCO's writ of attachment efforts, and as such, the attorneys' fees and costs incurred in their
 8 preparation are also an item of Defendants' potential damages for wrongful attachment.

9 In short, securing the quashing of the writ of attachment and the release of the Vessel
 10 was not straightforward, and it was undoubtedly a very time-consuming and costly endeavor. The
 11 attorneys' fees and costs incurred by Defendants to defeat the AGODCO's writ of attachment of the
 12 Vessel were reasonable and necessary. Having prevailed in their defense of the writ of attachment and
 13 incurred significant attorney's fees and costs in doing so, Defendants' potential recovery for damages
 14 for wrongful attachment should not be limited by the statutory minimum bond amount of \$10,000, and
 15 as such, AGODCO must be ordered to increase the undertaking posted with the Court.

16 B. THE EQUITIES COMPEL AN INCREASED UNDERTAKING.

17 The equities clearly support an increase in the undertaking here. AGODCO availed
 18 itself of this Court's jurisdiction and California's writ of attachment law to secure an order from this
 19 Court to attach the Vessel as security for the full value of its underlying counterclaim in London
 20 arbitration. Defendants contend these actions were conducted solely to escalate and apply undue
 21 commercial pressure on Defendants pursuant to the Parties' pending and competing arbitration claims.
 22 Conversely, Defendants should benefit from these same extraordinary rules and procedures which
 23 expressly allow for an undertaking to be posted for the full value of its potential damages for wrongful
 24 attachment, including its attorneys' fees incurred in defeating the attachment. Having selected this
 25 forum and these procedural rules and used them to its benefit, equity compels AGODCO be bound by
 26 the same rules when they operate against its interests.

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IV.

CONCLUSION

In light of the foregoing, Defendants respectfully requests that the Court order the amount of undertaking to be posted by AGODCO be increased to \$186,804.05. This amount appropriately addresses the damages, attorneys' fees and costs incurred by Defendants and constitute their probable recovery for damages for wrongful attachment in the likely event that AGODCO's counterclaim in London arbitration fails.

DATED: September 29, 2016

/s/ James A. Marissen

ELIZABETH P. BEAZLEY

JAMES A. MARISSEN

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WISDOM MARINE LINES, S.A. WISDOM M

WISDOM MARINE LINES, S.A, WISDOM MARINE LINES CO., LTD., and SAO WISDOM, S.A.

Case Name: *Arabian Gas and Oil Development Co v. Wisdom Marines Lines, et. al.*
Case No.: USDC, Northern District Case No: 4:16-cv-03801-DMR (related to 16-cv-03872)
KYL File No.: 7811-3

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
4 not a party to the within action; my business address is Keesal, Young & Logan, 400 Oceangate, Long
Beach, California 90802.

5 On September 29, 2016, I served the foregoing documents described as **SPECIALLY**
6 **APPEARING DEFENDANTS' NOTICE OF MOTION AND MOTION TO INCREASE**
7 **UNDERTAKING POSTED BY PLAINTIFF WITH THE COURT; MEMORANDUM OF**
POINTS AND AUTHORITIES IN SUPPORT THEREOF on the parties in this action by placing a
true copy thereof enclosed in a sealed envelope addressed as follows:

8 Frank C. Brucculeri, Esq.
9 Daniel F. Berberich, Esq.
10 KAYE, ROSE & PARTNERS
11 9100 Wilshire Blvd., Ste 420W
12 Beverly Hills, CA 90212
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Co-Counsel for Plaintiff ARABIAN GAS AND
OIL DEVELOPMENT COMPANY

20 BY CM/ECF: The document was electronically served on the parties to this action via
21 the mandatory United States District Court of California CM/ECF system upon electronic filing of
22 above-described document.

23 Executed on September 29, 2016 at Long Beach, California.

24 I declare under penalty of perjury under the laws of the State of California and United States of
25 America that the foregoing is true and correct.

26 I declare that I am employed in the office of a member of the bar of this Court at whose
27 direction the service was made.

28 /s/ Tammy Wade
29 TAMMY WADE